INDEX

Subject Index

PAGE

TABLE OF CASES

TABLE OF TEXT AUTHORITIES

TABLE OF STATUTES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

To the Supreme Court of the United States and the Honorable Justices thereof:

The petition of Sam A. Wilson praying for a Writ of Certiorari on the ground that the Courts of Montana have denied full faith and credit to a final judgment rendered in the United States District Court of Wyoming, and in support thereof respectfully shows to this Honorable Court:

(The references herein are to the Transcript of the Record as used in the Supreme Court of the State of Montana as Tr.—).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On November 25, 1938, a judgment and decree was entered by the District Court of Toole County, Montana, upon Findings

of Fact, Conclusions of Law and Order for Judgment that John N. Thelen, Respondent herein, was, ever since the 20th day of September, 1932, the legal owner of certain interests in lease holds in Toole County, Montana, and that the petitioner Sam A. Wilson has no right, title, estate, demand or lien in, to, or upon said property, or any part thereof. (Tr. 108 to 120)

From this judgment an appeal was taken to the Supreme Court of the State of Montana, which Court affirmed the decree entered in the trial Court by a decision filed on March 18th, 1940, and a remittitur was thereafter returned to the Clerk of the District Court of Toole County, Montana, whereby said judgment became and is a final judgment.

Petitioner, in 1929, began a suit in the United States District Court for Wyoming against John N. Thelen, Ferdig Oil Company through whom John N. Thelen, respondent herein, acquired the leasehold interests in question, and also against S. C. Ferdig and others, which petition was based upon a contract made between petitioner and S. C. Ferdig and one H. L. Lowe whereby it was agreed that said parties become joint adventurers in acquiring and developing oil lands and leases in Montana and elsewhere; that each of said parties were to own a one-third interest in such lands and leaseholds and personal property thereafter to be acquired by S. C. Ferdig. That S. C. Ferdig, pursuant thereto, did thereafter acquire lands and leaseholds, equipment and other personal property in Montana and Wyoming and failed to perform said contract and recognize an interest in Wilson, but, on the contrary, conveyed the leasehold interest and other property involved in this action, to the Ferdig Oil Company which was at that time managed and controlled by said S. C. Ferdig, and said corporation was charged with knowledge of the agreement made with Wilson. That the parties to said suit had perpetrated a fraud upon your petitioner by denying him an interest in said assets and attempting to prevent him from so claiming said property by various transfers. A determination of the rights of the parties in the lands and leaseholds and personal property thus acquired, and the appointment of a receiver for the defendants was prayed for. (Exhibit 8, pages 28 to 72)

S. C. Ferdig was then a resident of the State of Wyoming,

and president of the Ferdig Oil Company; respondent John N. Thelen was a resident of the State of Montana; and petitioner a resident of the State of Minnesota; H. L. Lowe was a resident of the State of Wisconsin, but was not served with process.

Thelen, Ferdig, Ferdig Oil Company and other defendants appeared and moved to dismiss the action for lack of jurisdiction and on other grounds, which motions were denied. (Exhibit 8, pg. 24, ans 74 to 77) Whereupon these defendants appeared generally by answer denying the claims of your petitioner and asserting affirmative defenses on which they asked relief. (Exhibit 8, pgs. 81 to 113)

After a trial upon the merits, the Court dismissed the action as to Thelen for lack of proof of any fraud on his part and found that the agreement was made between Wilson, the petitioner herein, and S. C. Ferdig as claimed, and that petitioner owned a one-third interest in lands, leaseholds and personal property acquired by said S. C. Ferdig, including the leaseholds and other personal property involved in this present action, which said Ferdig had conveyed to the Ferdig Oil Company with knowledge on the part of the Company of the ownership of a one-third interest in petitioner, which findings were made on December 11th, 1931, and judgment was entered accordingly on said date. (Exhibit 8, pgs. 117, 119) An appeal was taken to the Circuit Court of Appeals upon an issue involving the Cody Petroleum Company which was determined in 1933. On June 6th, 1933, a receiver was appointed for the Ferdig Oil Company. That said judgment so entered on December 11th, 1931, remains in full force and effect.

On March 31st, 1936, three years after the commencement of the present suit, respondent Thelen came back into the original action in Wyoming, and, together with Ferdig Oil Company and one F. J. Buscher, who was then president of the Ferdig Oil Company and interested in the property in question, filed a petition attacking the jurisdiction of the Wyoming Court praying for an order vacating the judgment and dismissing the Wyoming action. (Exhibit 8, pgs. 224, 232, 236) This motion was denied by the trial court. (Exhibit 8, pgs. 243-247)

An appeal was taken by the moving parties to the Circuit Court of Appeals of the Tenth Circuit, (Exhibit 8, pg. 247)

which Court affirmed the trial court in a decision filed August 27th, 1937, and found in 91 Fed. Reporter, 2nd series, on page 857, that

> "The bill alleged that complainant, appellee here (Wilson) was then a resident of the State of Minnesota, and a citizen of the United States; that the Delaware corporations (including Ferdig Oil Company) were citizens and residents of the state of their creation; that S. C. Ferdig and his wife I. E. Ferdig were residents of Cody, Wyoming; that the two common law trusts were citizens and residents of Montana; that they and some of the named corporation defendants had property and effects in the state of Wyoming; and that the amount in controversy exceeded the value of $3,000 exclusive of interest and costs.
>
> The basis of the complaint was an alleged joint adventure agreed upon in January, 1924, between S. C. Ferdig, H. L. Lowe and the plaintiff, Wilson, each to share a third interest therein; that Ferdig represented that he was then drilling an oil well in Montana on a lease which required a cash payment of $2,000 and an additional payment of $6,000 out of earnings in any oil that might be found on the property; that he was then without means and unable to pay the $2,000 due; that he had a drilling outfit which was incomplete and only partially paid for and he required financial assistance to go on. He also represented that he was skilled in locating, exploring and drilling for oil and believed that if he could obtain sufficient finances to drill one well the income would finance the drilling of additional wells on that lease and elsewhere."

The Court also states that each of the three were to have a one-third interest in the assets and profits resulting from said joint adventure; that Wilson performed his part of the contract; that Ferdig thereafter shifted titles of the leases to other defendants and to himself and wife, and that it was claimed by Wilson in his complaint that Thelen entered into a conspiracy to cover up the title and interest of Lowe and himself in the joint adventure, and that the Ferdig Oil Company was organized

in part for that purpose and ignored the interest of Wilson. Wilson prayed that his interest in all the leases and in the oil that had been produced be ascertained by the Court and that a receiver be appointed to take charge of and operate the property so far as that might be necessary to protect the rights of complainant.

The Court then refers to the present action commenced in the State of Montana, wherein it is claimed that Thelen was producing oil under a lease which belonged to the Ferdig Oil Company and that he had acquired the leaseholds through tax sales of property and otherwise, and it denied that he had any title or equity in good conscience to said property and asked the Court to so adjudge and that Wilson be decreed to be the owner of a one-third interest in said property and entitled to an accounting for the profits. The Court says:

> "But when the nonresident defendants came in with their answers to the merits and plead affirmative defenses on which they asked relief they submitted themselves and their rights in the controversy to the full jurisdiction of the court over their persons and over their property in which appellee claims an interest wherever situate. Simkins Federal Practice (Rev. Ed.) Chapters LXXXI, LXXXII; Foster, Federal Practice (6th Ed.) Vol. 1, Ch. VII; Dana v. Searight (C. C. A.) 47 F. (2d) 38."
> 91*Fed. Rep.* 2*d.* (857-860)

From this decision no appeal was taken to this Court and a mandate was duly returned to the trial court and said judgment entered in the United States District Court of Wyoming thereby became final.

Prior to the trial of the Wyoming suit, but after its commencement, the Oil Well Supply Company had started a suit in Toole County, Montana, to foreclose a lien upon the leasehold interets of the Ferdig Oil Company described in the present suit and described in the Wyoming suit. Respondent Thelen thereafter, and with full knowledge of the suit of the petitioner in Wyoming, and with knowledge of the claim he made to own a one-third interest in said property, purchased the Oil Well Supply

Company claim, and at a decretal sale held on July 10th, 1931, purchased the interest of the Ferdig Oil Company in and to the leasehold interests involved in this proceeding from which sale no redemption was made. Respondent Thelen had previously acquired tax assignment certificates, but title under them was never perfected. During this time Thelen was attorney for the Ferdig Oil Company, was Vice-President of the Yellowstone Petroleum Company which owned eighty-two per cent of the Ferdig Oil Company stock, and his law partner, Freeman, was an officer of the Ferdig Oil Company. Evidence was produced that respondent Thelen had been employed by the Ferdig Oil Company to protect it against the claim of the Oil Well Supply Company, or, at least to procure the claim so that it would be in friendly hands. Respondent was acting for the Ferdig Oil Company when he procured the tax assignment certificate.

On July 27th, 1931, respondent Thelen testified and took part in the trial of the Wyoming suit, but failed to disclose his interest in the properties although the decretal sale had taken place on July 10th, less than two weeks previously. (Tr. 344 to 345)

In June, 1933, this present suit was commenced in Toole County, and was brought to obtain a judgment that respondent had no claim to the one-third interest in the leaseholds and personal property which was adjudged in the Wyoming suit to belong to this petitioner and to have decreed that the title and claim of plaintiff thereto was good and valid and enjoining respondent from asserting any claims thereto. Your petitioner in this suit set forth in his complaint, and on the trial, relied upon the determination of the Wyoming Court construing the agreement here relied upon, and upon the trial offered in evidence the duly authenticated copy of the Findings of Fact, Conclusions of Law and Judgment and Decree in the Wyoming suit, claiming it was a final determination of the rights of petitioner under his agreement with Ferdig as against Ferdig and the Ferdig Oil Company against whom the judgment was entered, and claiming also that it was a final determination as to Thelen who was a party to the Wyoming suit, and who was in privity with the Ferdig Oil Company having acquired the property through this corporation Ferdig Oil Company and with the

knowledge of the claims of the petitioner. The trial court received the evidence over the objection of respondent, but rendered his decision in favor of respondent on the ground that the Court of Wyoming was without jurisdiction and hence the judgment and decree was not res adjudicata as to the claims of petitioner and did not estop respondent from denying the contract between petitioner and Ferdig, and the Court found that respondent was the owner of the property including the one-third interest which the petitioner claimed in and to the leaseholds, wells, tools and equipment and oil and gas remoyed therefrom, which the Wyoming Court found was held by the Ferdig Oil Company for the use and benefit of petitioner. Judgment and decree was thereupon entered on November 25th, 1938.

It was from this judgment and decree that an appeal was taken by your petitioner to the Supreme Court of the State of Montana. The Supreme Court of Montana held that the Federal Court of Wyoming was without jurisdiction to adjudicate title to the lands in Montana; that the judgment there entered was not res adjudicata as to Thelen and Buscher (Buscher having acquired a portion of the Thelen interest) nor were they estopped from again litigating the question of the agreement between petitioner and Ferdig, and found that no joint adventure existed between petitioner, Ferdig and Lowe; that petitioner was guilty of laches in asserting his claims against said Respondent Thelen and against said Buscher. Said decision was rendered on March 18th, 1940, judgment was entered pursuant thereto, and the case remanded to the District Court of Toole County.

B.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In arriving at its decision, the Supreme Court of the State of Montana found that the pleadings in the Wyoming case raised the question of title and ownership to the land here involved, that the answer of Thelen did not set forth facts constituting his chain of title, but it is firmly established that an action to determine title to or an interest in real estate is local and that the courts of one state have no jurisdiction to litigate title to lands in another state.

2. In arriving at this conclusion the Court ignored the fact that the Wyoming suit was based upon a contract, a trust, and a claim of fraud, purely transitory causes of action. The Court failed to recognize the well settled law that in such actions title to lands in other states may be litigated if an incident of such litigation.

3. In refusing to recognize the jurisdiction acquired by the Wyoming Court through the appearance of the defendants and their answer to the merits and assertion of affirmative relief, the Court disregarded the decision of the United States District Court of Wyoming and the Circuit Court of Appeals for the Tenth Circuit in deciding the claim of respondent upon the motion of said Thelen for an order to vacate the judgment, and the Court failed to consider the clear implications of decisions of this Court upon the subject.

4. The Court failed to recognize that a joint adventurer is not a necessary party to litigation involving the claims of one joint adventurer against another and failed to give due consideration to the uncontradicted evidence that H. L. Lowe had settled his claims to any interest in the property before petitioner's suit was commenced in Wyoming and had dismissed his action brought to establish his claim, and therefore said Lowe made no further claim to any assets of the joint adventure.

5. The Court failed to give full faith and credit to the Wyoming judgment as establishing the fact of the agreement between Wilson and S. C. Ferdig, and that by the terms thereof Wilson owned a one-third interest in and to the lands, leaseholds and other personal property acquired by S. C. Ferdig in Montana and Wyoming, and that as a result thereof the transfers by said Ferdig to the Ferdig Oil Company were made with notice of such claims and hence said property was charged with a trust, which judgment was rendered in a Court having jurisdiction over the parties and over the subject-matter,—the contract and trust,—and that these issues were adjudicated as to the Ferdig Oil Company and those in privity with it, including respondent Thelen, and that by reason thereof, respondent Thelen was estopped from again litigating these questions. Whether the Wyoming Court thus determined title to lands in Mon-

tana is not important. The judgment in Montana determined that a contract existed between petitioner and Ferdig and the terms thereof, and that Wilson had performed and that Ferdig had breached the same. Had the Montana Court given the full faith and credit due this judgment in the action before it to enforce the agreement thus determined, the Court would, of necessity, have been required to render judgment in favor of petitioner.

6. The Court failed to recognize that the claim of the Oil Well Supply Company was against the interest of the Ferdig Oil Company only.

7. The Court failed to give due consideration to the acquisition of the interest of the Ferdig Oil Company by respondent with knowledge of petitioner's claims. Hence said respondent acquired no greater rights than those held by the Ferdig Oil Company.

8. The effect of the decision by the Court in Montana is to hold that while the United States Court in another State has determined the terms of a personal contract and an actual trust created thereby, and a resulting trust arising from the acts of the parties, as well as from a fraud perpetrated by the defendants, nevertheless the issues were permitted to be again litigated in the Courts of Montana in an action wherein the decree is not claimed to be the source of title.

9. The effect of the decision is to deny to the United States District Court of Wyoming, jurisdiction to determine all of the issues incident to a contract made in Wisconsin contemplating business transactions in Montana and elsewhere, and to require trials in various states should the business of the parties extend over several states.

10. The effect is to permit respondent, Ferdig Oil Company, John N. Thelen and F. J. Buscher to attack the jurisdiction of the United States District Court in Wyoming, and to appeal to the Circuit Court of Appeals from an adverse decision, and yet not be bound by an adverse decision therein, but permit said parties to again litigate the same issues.

WHEREFORE your petitioner respectfully prays that this petition be granted, that a writ of certiorari issue to the Supreme Court of Montana to review the final judgment entered pursuant to its decision on appeal from the judgment entered in the District Court of Toole County, Montana.

SAM A. WILSON, *Petitioner*

By THEO. HOLLISTER
AUSTIN LATHERS
JAY H. HOAG
LOUIS P. DONOVAN
Counsel for Petitioner.

JOHN D. JENSWOLD
Of Counsel.

STATE OF MINNESOTA,
COUNTY OF ST. LOUIS—ss.

Jay H. Hoag being duly sworn, says that he is attorney for Sam A. Wilson, the petitioner named in the foregoing entitled matter; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, and that the reason this verification is not made by petitioner is that he is absent from the County of St. Louis and State of Minnesota, wherein affiant resides.

JAY H. HOAG

Subscribed and sworn to before me
this 12th day of June, A. D. 1940.
A. M. GOGINS
Notary Public, St. Louis Co., Minn.,
My commission expires Sept. 6, 1946.

(NOTARIAL SEAL)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURTS BELOW.

The Findings of Fact and Conclusions of Law of the trial court of Toole County, Montana, are set forth in the Transcript on page 116.

The opinion of the Supreme Court is set forth in the Transcript on page Tr. 675 to 681.

The petition and answers in the Wyoming case are set forth in Exhibit 8 on pages 29 to 49, and 81. (Tr. 691-795)

The motion of respondent for an order vacating the Wyoming judgment is set for in Exhibit 8 on pages 232 to 236, with the decision thereon found on pages 243 to 247 of Exhibit 8.

The order of the Court denying the motion to vacate was affirmed in the Circuit Court of Appeals in Volume 91 Federal Reporter, Second, page 857.

II.

JURISDICTION.

1. The date of the decision by the Supreme Court of the State of Montana and judgment to be reviewed is March 18th, 1940. (Tr. 675-681)

2. The Supreme Court of the State is the highest Court of the State of Montana, and when judgment is rendered it must be certified immediately to the Clerk of the Court from which the judgment appealed from was entered. (R. C. M. 9752, 8805).

3. The statutory provisions which are believed to sustain the jurisdiction of this Court are

(a) *Judicial Code*, Sec. 237;

(b) *As amended by Act of February* 13*th*, 1935, *Title* 28,*U. S. C. A.*, Sections 344 and 350;

(c) *Revised Statutes, Section* 905; *Title* 28 *U. S. C. A.*, Section 687.

4. The complaint filed in the District Court of Toole County, Montana on June 15th, 1933, and as amended, was predicated upon the properly authenticated judgment rendered in the United States District Court of Wyoming in the action of petitioner against Ferdig Oil Company through whom the respondent herein claims; that respondent was a party to said action in Wyoming but failed to disclose any interest in the property involved herein, although he now claims to have owned the property at the time of said trial. (Tr. 2-21)

Respondent's answer here admits the Wyoming suit and the issues therein tried as claimed by petitioner, but alleges as a defense that the Court was without jurisdiction because its jurisdiction was invoked on the ground of diversity of citizenship that Lowe, one of the joint adventurers, was not served with a subpoena nor did he come voluntarily into Court, hence there was an absence of indispensible parties. (Tr. 22)

Respondent further answered admitting that ever since the 10th day of July, 1931 he has been and still is in possession of said wells, tools, machinery and equipment, and has caused some of the wells to be operated, and that he bid in at judicial sale all the right, title and interest of the Ferdig Oil Company in said oil and gas leases covering the lands in question. He also alleged that he acquired certain tax certificates (on which title was never perfected.) (There was no claim raised in the answer that the Court in Wyoming had no jurisdiction over the property and subject matter involved).

5. The pleadings directly drew into question the full faith and credit clause of the United States Constitution.

6. In establishing a prima facie cause in the District Court of Toole County, Montana, petitioner relied entirely upon the properly authenticated Findings, Conclusions and Decree in the Wyoming suit as having established the contract and its performance by petitioner as his source of claim, and that further evidence or additional proof was presented as to the leaseholds and other property acquired by S. C. Ferdig in Toole County, Montana, and their transfer to Ferlig Oil Company and thence to respondent Thelen.

7. In refusing to recognize the validity of said judgment and decree by receiving over petitioner's objections evidence tending to again litigate the issues tried in the Wyoming Court, the trial Court of Toole County, Montana of necessity gave consideration to the constitutional question because it subjected said judgment and decree to collateral attack and in reaching its conclusion ignored the plain effect of such judgment and decree and invoked an exception to the full faith and credit clause where a contract, trust and fraud is established.

8. Likewise, the Supreme Court in affirming the judgment of the District Court of Toole County, failed to give full faith and credit to the judgment entered in the United States District Court for the District of Wyoming, and failed to recognize that the Wyoming suit was based upon a contract involving a trust and fraud.

The full faith and credit clause of the Constitution was therefore invoked:

(a) in the pleadings;

(b) in the offer of the duly authenticated copies of the Findings, Conclusions and judgment, entered in Wyoming;

(c) in the refusal of the Court to recognize the validity and effect of said Findings, Conclusions and Judgment as an adjudication;

(d) in the briefs and arguments presented to the Court.

This is evidenced by the record including the decision of the trial Court and the Court of Appeals.

9. The following cases sustain the jurisdiction of this Court to review the decision and final judgment affirming the trial court of Toole County, Montana.

Embry vs. Palmer, 107 U. S. 3;

Hancock vs. Farnum, 176 U. S., 640;

West Side R. R. vs. Pittsburgh Construction Co., 219 U. S. 92;

Acme Harvester vs. Beekman Lbr. Co., 222 U. S., 300;

Rollin vs. Murphy, 234 U. S., 738;

Knights of Phythias vs. Meyer, 265 U. S. 30;

Roche vs. McDonald, 275 U. S. 449;

Honeyman vs. Honan, 300 U. S. 14;

Adams vs. Saenger, 303 U. S., 59;

Titus vs. Wallich, 306 U. S. 282.

Title 28 *U. S. C. A.* Sec. 344.

---

34 *C. J.* 1160, note 59.

III.
STATEMENT OF THE CASE.

A full statement of the case having been given under the heading in "A" in the petition, no repetition of the statement will be made at this time, but such statement is hereby adopted and made a part of this brief.

IV.
SPECIFICATIONS OF ERROR.

The reasons relied on for the allowance of the petition appear in the Petition for the Writ, and may be summarized as follows:

A. The Court erred in failing to give full faith and credit to the judgment entered in the United States District Court for Wyoming, because—

1*st*. The trial court erred in receiving and considering evidence in respect to the contract between petitioner and S. C. Ferdig which constituted a re-trial of the issues already litigated in Wyoming and tending to impeach the judgment there rendered, and erred in concluding that no agreement existed between petitioner and said Ferdig, notwithstanding the litigation and determination of the issues by the United

States District Court of Wyoming, which action of the trial court was sustained by the Supreme Court of Montana.

2*nd*. The Courts of Montana concluded that the Wyoming judgment was not res adjudicata for want of jurisdiction;

3*rd*. The trial court erred in receiving and considering the testimony of Lowe to the effect that there was no contract between Wilson, Ferdig and Lowe, although Lowe admitted upon cross-examination that he had written a letter in which he stated that said Wilson had performed his part of the agreement, and "had a one-third interest in the enterprise."

B. The Court erred in concluding that the Wyoming Court was without jurisdiction over the subject of the action, and in concluding that the subject of the action was solely title to real estate, and that the action was local.

C. The Court erred in concluding that Lowe was an indispensable party to the Wyoming action.

D. The Court erred in concluding that respondent acted in good faith and that petitioner was guilty of laches, because—

1*st*. The question of good faith and laches is not a material issue if the judgment entered in Wyoming against the Ferdig Oil Company is valid.

2*nd*. Because it appears from the evidence that appellant was diligent in prosecuting his cause, and there was no evidence of any damage sustained by respondent by reason of the matter of delay.

ARGUMENT

SUMMARY OF THE ARGUMENT

Point I. The prosecution of this action by petitioner against respondent in Montana of necessity raised and involved a con-

stitutional question because petitioner's action was predicated upon a judgment of Wyoming. The question was disposed of in a manner directly derogatory to petitioner's constitutional rights. Therefore petitioner here seeks to invoke this Court's jurisdiction.

Point II. Petitioner's judgment and decree remain unimpeached and unimpeachable in the Courts of the United States and the Courts of the various states.

Point III. The defendants in this trial of the Wyoming action having answered to the merits, and having pleaded affirmative defenses upon which they asked relief, submitted themselves and their rights in the controversy to the full jurisdiction over their persons and over their property wherever situated in which petitioner claims an interest.

Point IV. The Wyoming suit was predicated upon a contract, trust, and fraud which sustain jurisdiction of the Court because of its jurisdiction over the person of the defendants and the issues as to the existence and terms of the contract. The determination of title to lands and leaseholds and other personal property in question was an incident to the litigation of all issues between the parties.

Point V. The judgment against the Ferdig Oil Company binds it, and those in privity with it, including respondent.

POINT I. The prosecution of this action by Petitioner against Respondent in Montana of necessity raised and involved a Constitutional question because Petitioner's action was predicated upon a Judgment of Wyoming. The question was disposed of in a manner directly derogatory to Petitioner's Constitutional rights. Therefore Petitioner here seeks to invoke this Court's jurisdiction.

This issue was clearly presented to the Court:

FIRST — In the complaint which alleged the contract and rights of the parties as having been litigated in Wyoming, and in the recital of the Findings of Fact, Conclusions of Law and Decree therein as the basis for the recovery in the Montana case:

SECOND — In presenting in evidence the duly authenticated proof of the Findings of Fact, Conclusions of Law and judgment in the Wyoming case and the reliance thereon to prove the claims of petitioner:

THIRD — In the attempt of respondent and Ferdig Oil Company and F. J. Buscher to vacate the judgment in Wyoming to the extent of appealing to the Circuit Court of Appeals, Tenth Circuit:

FOURTH — In the arguments and brief presented in the trial court and on appeal:

FIFTH — In the Findings of Fact and Conclusions of Law of the trial court that a judgment and decree was entered in the Wyoming case decreeing this petitioner to be the owner of a one-third interest in the lands and leases acquired by S. C. Ferdig but that the action was local and "the decree binding and effective only upon property within the jurisdiction of the court";

SIXTH — In the appeal to the Supreme Court by assignment of errors and by brief and argument:

SEVENTH — In the decision of the Supreme Court in holding "there would be merit in plaintiff's contention (that the Wyoming decree adjudicated the title and ownership to lands involved) if the Wyoming Court had jurisdiction to litigate title to lands in Montana, but it is firmly established that an action to determine title to or an interest in real estate is local and that the courts of one state have no jurisdiction to litigate the title to lands in another State."

This Court, in determining its own jurisdiction, has uniformly and repeatedly held that where suit is filed in one state on a judgment procured in a sister state, or in a United States Court sitting in a sister state, the question presents one arising under the constitution of the United States as has already been pointed out in the Writ under Section II and subject of jurisdiction.

Hancock vs. Farnum, 176 U. S., 640

As already pointed out, this constitutional question was kept in the fore ground not only by presenting the decree in the Wyoming case and relied upon here, but in the pleadings, brief and argument.

Arme Harvester Co. vs. Beekman Lbr. Co., 222 U. S., 300.

The right to a review is recognized if it appears from the record that such rights were brought to the attention of the State court in due time.

Bryant vs. Zimmerman, 278 U. S. 63.

POINT II. Petitioner's Judgment and Decree remain unimpeached and unimpeachable in the Courts of the United States and the Courts of the various States.

The jurisdiction of the Wyoming Court was challenged by respondent, by Ferdig Oil Company and by the other defendants—

First, on motion to dismiss, which was denied;

Second, by answer, and the Court decided the matter adversely to the defendants;

Third, by motion of respondent and Ferdig Oil Company to vacate the judgment and for dismissal of the action, which motion was denied;

Fourth, By appeal to the Circuit Court of Appeals for the Tenth Circuit, which determined the question adversely to the moving parties in a decision which sustained the trial court.

Ferdig Oil Co. vs. Wilson, 91 Fed. Sec. 857.

If a judgment is valid and conclusive between the parties in the State where rendered, it is equally conclusive under the full faith and credit clause in the courts of any other State where presented.

Christmas vs. Russell, 72 U. S., 290;

Embry vs. Palmer, 107 U. S., 3, 9;

Hancock vs. Farnum, 176 U. S., 640, (644)

McDonald vs. Mabee, 243 U. S., 90;

Roche vs. McDonald, 275 U. S., 449;

Titus vs. Wallich, 306 U. S., 282;

Adams vs. Saenger, 303 U. S., 59.

While the trial court may, when a foreign judgment is presented to it, inquire into the question of jurisdiction, yet the extent of jurisdiction must be determined by the law of the State where rendered.

The presumption exists that the Court in Wyoming acted within its jurisdiction and that the judgment is valid and binding.

15 *R. C. L.*, 893, Sec. 373.

The effect of a foreign judgment in a court having jurisdiction to pronounce the judgment is governed by the Statutes of Montana as follows:

> FIRST — In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;
>
> SECOND — "In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law."
> *R. C. Mont.* 10565
>
> "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding."
>
> *R. C. Mont.* 10563
>
> *See Christmas vs. Russell*, 72 U. S. 290

The present suit is such a proceeding as is contemplated in the Statutes of Montana cited above, and is brought to enforce

the rights under the agreement as determined by the judicial record of the Wyoming suit and as contemplated by the Montana Code, Section 10563.

Faunteleroy vs. Lum, 210 U. S. 230;

Elmoyle vs. Cohen, 13 Peters, 312.

The Wyoming Court obtained full jurisdiction when all the parties submitted the issue as to whether there was a contract and if so, what were the terms thereof, and whether or not that contract had been performed or breached.

POINT III. The Defendants in this trial of the Wyoming action having answered to the merits, and having pleaded affirmative defenses upon which they asked relief, submitted themselves and their rights in the controversy to the full jurisdiction of the Court over their persons and over their property wherever situated in which petitioner claims an interest.

S. C. Ferdig was, at the time of the commencement of the action, in August, 1929, a resident of Wyoming. He was then President and manager of the Ferdig Oil Company, a Delaware Corporation. Both of these defendants must therefore be considered residents of the State of Wyoming and within the jurisdiction of the Court. Respondent Thelen, while a resident of the State of Montana at that time, appeared with the other defendants including Ferdig Oil Company and S. C. Ferdig, and answered to the merits, and pleaded affirmative defenses on which relief was asked. These defendants, whether residents of Wyoming or not thereby submitted themselves and their rights to the property claimed by petitioner to the full jurisdiction of the Court.

In Dunlop vs. Byers, 110 Mich., 109, 67 N. W. 1067, the Court of Michigan gave effect to the judgment rendered in Ohio in a suit for the dissolution of a partnership and for an accounting.

Fosters Federal Practice, 4th Ed. Chapter VII.

Attention is called to the fact that the action in Wyoming involved personal property such as the equipment and proceeds from the oil production on the lands in question. The leasehold interest being granted for the period of oil production and subject to compliance with certain conditions may be treated as personal property, but, whether treated as personalty or realty, the action in Wyoming involved personal property which is purely a transitory cause of action and the Court having jurisdiction over these parties litigated these issues. The trial court and the Supreme Court in determining this litigation failed to give full faith and credit to the judgment entered in Wyoming based on a transitory cause of action involving personal property and erred in this respect.

POINT IV. The Wyoming suit was predicated upon a contract, trust and fraud which sustain jurisdiction of the Court because of its jurisdiction over the person of the Defendants and the issues as to the existence and terms of the contract. The determination of title to lands and leaseholds and other personal property in question was an incident to the litigation of all issues between the parties.

The Courts of Montana erred in concluding that the Wyoming Court had no jurisdiction over the subject matter,—

FIRST, Because they failed to distinguish between an action involving only title to lands in the nature of an action to quiet title and an action brought to construe a contract and to determine rights thereunder, not only to real estate, but to personal property and for a division of profits;

SECOND, Because the Courts failed to consider the nature of a joint adventure and an action for an accounting for property and failed to consider funds and assets in the hands of a joint adventurer to be a trust and to be personalty whether real estate or other property;

THIRD, Because the Court concluded contrary to the Circuit Court of Appeals, Tenth Circuit, in Ferdig Oil Company vs. Wilson, 91 Fed. 2nd, 857, that by the ap-

pearance of respondent Thelen in Wyoming he did not submit himself and his property rights to the jurisdiction of the Wyoming Court, and the Court failed to give consideration to the fact that the Ferdig Oil Company was within the jurisdiction of the Court and all of its rights were submitted to litigation;

FOURTH, Because the Court ignored the fact that personal property was an issue in the Wyoming suit.

The result of the decision would be the increased litigation in every State where property of a party or joint adventurer might be situated. It would mean that although the action involved title to personal property, which is purely transitory, yet, if as an incident to determine all the right under a contract, title to real estate were involved, then the Court would lose jurisdiction of the cause. The Courts of Montana characterize the Wyoming action as local and that the Court was without jurisdiction to determine appellant's interest in personal property.

The complaint in the Wyoming action alleged:

The agreement between S. C. Ferdig, petitioner and H. L. Lowe, whereby each should have a one-third interest in and to all of the assets and profits of the joint enterprise: (Exhibit 8, par. 3)

Describes leaseholds and personal property involved in the present action: (Par. 6)

Alleges that Ferdig conveyed the same to the Ferdig Oil Company in fraud and with full knowledge of the corporation that the petitioner owned a one-third interest therein: (Par. 25)

That a fraud was perpetrated upon the petitioner and the defendants holding title to the property were involuntary trustees acquiring the title with the knowledge of Petitioner's claims: (Par. 33 and 34)

That the Ferdig Oil Company held the lands in trust; that the action was brought for a final determination of the rights of all the parties having or claiming an interest

in or to the realestate, leases, or other property of the defendants, to the end that the same may be fully adjudicated: (Par. 36)

The complaint then closed with a prayer that the defendants disclose what property or money was received by them from any of the defendants and that said property be set apart to petitioner and the other joint adventurers their interest and share therein, and that any transfer by the defendants of any property, money or effects belonging to petitioner, or in which he has an interest, be declared fraudulent and void, and that recovery be had for the use and profit thereof.

The answers of respondent and Ferdig Oil Company and S. C. Ferdig denied the contract (Par. 4 and 9); described leases upon the lands involved herein (Par. 5 and 6); admitted that S. C. Ferdig conveyed lands in Montana to the Ferdig Oil Company, (Par. 9 and 10); but denied that these lands were acquired with any money or property of the joint enterprise, (Par. 19) and denied that they were holding any property of the joint enterprise, (Par. 19); denied the agreement sued on, (Par. 29); denied that they were trustees of the property of the joint adventure (Par. 35 and 36); denied that the action was brought for a final determination of the right of the parties to the real estate, leases and personal property, (Par. 36); asserted the statute of limitations of Montana and Wyoming (Par. 3 and 6 of the First Separate Defense) and alleged defensive laches (Par. 4 of the Fourth Separate Defense) and prayed for judgment and further relief.

The trial court in Wyoming characterizes the action in his memorandum as follows:

> This is a suit in equity in which the complainant seeks to have established a trust in certain properties and an accounting from the defendants under a joint adventure agreement entered into in 1924 involving the exploitation of lands for oil content."

The Court in Wyoming found as a fact that the rights of Lowe were not involved in the litigation; that an agreement of

joint adventure was made in January, 1924, between Wilson, Ferdig and Lowe to the effect that lands and leases should be acquired and developed and that "each should own and hold a one-third interest in the property thereafter to be acquired by S. C. Ferdig and the assets resulting from the joint enterprise until an accounting should be had by said Ferdig." (Tr. 108 to 115)

The Court found that petitioner performed his agreement and advanced, or paid to S. C. Ferdig $10,000.00, and Ferdig transferred to the Ferdig Oil Company and other defendants lands and other personal property acquired by him in Montana and Wyoming with the knowledge and notice of petitioner's claim.

The Court concluded that petitioner owned a one-third interest in lands and leases and personal property acquired by S. C. Ferdig and that the Ferdig Oil Company and other defendants should account to petitioner therefor. (Par. 1 and 2)

The decree was entered pursuant to the Findings of Fact and Conclusions of Law.

It appears from the foregoing that the title to the lands and leases and other personal property in Montana was incident to the full and final determination of the rights of petitioners to all the assets of the joint adventure and agreement sued upon.

In adjusting the rights of partners between themselves real estate owned by the partnership is treated in equity as personal property with power in the Court to determine what property belongs to the partnership.

Coleman vs. Apple, 298 Fed. Rep. 718

Allen vs. Withrow, 110 U. S. 119

Riddle vs. Whitehill, 135 U. S. 621

Had no judgment been obtained in Wyoming, petitioner to establish his claim in Montana would have been required to allege and prove—

(a) The agreement of joint adventure and under it a claim or title to a one-third interest in the assets;

(b) Performance of the agreement;

(c) Acquisition of lands and leaseholds and personal property by Ferdig pursuant thereto;

(d) Failure or refusal of Ferdig and his assignee, Ferdig Oil Company, to convey to petitioner;

(e) Conveyance to Ferdig Oil Company with knowledge of petitioner's claim;

(f) Acquisition by respondent with knowledge of petitioner's claim.

If the Wyoming judgment is held to be binding the repuirements of (a), (b), (c), (d) and (e) would have been already litigated. These all relate to a personal contract and present a transitory action, leaving only the question of the acquisition by respondent with knowledge of petitioner's claim to be litigated and proved in the Montana Court. The Supreme Court of Montana resolved this question in favor of petitioner in holding that the respondent acquired the lands in Montana with the knowledge of petitioner's claim thereto.

Consequently the petitioner by this action seeks to enforce his rights under an agreement duly established by a court of competent jurisdiction. Had the Ferdig Oil Company not been personally within the jurisdiction of the Wyoming Court, or not having appeared by answer and asserted affirmative relief, the conclusion of the Montana Court as to jurisdiction of the Wyoming Court would probably be correct.

As sometimes stated, the decree, so far as it relates to land in another state, may have no extra territorial effect, yet, if valid, it binds personally those who were parties to the case and can be enforced where the land lies by proper proceedings conducted for that purpose, and such parties are estopped to again litigate the issues thus determined. This is precisely the purpose of the present litigation.

Massie vs. Watts, 10 U. S. (6 Cranch) 148
Cheaver vs. Wilson, 76 U. S. 108 (121)
Phelps vs. McDonald, 99 U. S. 298
Cole vs. Cunningham, 133 U. S. 107
Carpenter vs. Strange, 141 U. S. 106

14 *Am. Juris*, pg. 434, Sec. 242.

While in some respects it would appear that this principle is challenged, yet it is submitted that a distinction is made where the courts refuse to consider a foreign judgment as binding lands in other states.

That is, if the judgment itself, attempts to create the right or claim to lands in another state, it will not be enforced there, neither will it be recognized as of itself transferring title.

But where the right to lands arises out of contract, or is the result of fraud or a trust, and such right, question or fact has been directly put in issue and has been directly determined by a decree in equity by a court having jurisdiction over the parties, such a decree may be enforced by action in the state where the lands lie. The defendant in the foreign suit, and those in privity with such defendant are estopped to again litigate the issues thus litigated.

This proposition may be thus stated—If a court of equity has jurisdiction over the person, it may act indirectly through the instrumentality of this authority over the person. Whatever may be done through the party the Court may do to give effect to its decree respecting property whether it goes to the entire disposition of it, or imposes a burden upon it.

Hopkins vs. Lee, 6 Wheaton, 114

Lewis vs. Darling, 57 U. S. 1

Southern Pacific R. R. Co. vs. U. S., 168 U. S. 1, 48

Michigan Trust Co. vs. Ferry, 228 U. S. 346

Roche vs. McDonald, 275 U. S. 449

Norton vs. N. Y. House of Mercy, 101 Fed. 382

Uphoff vs. Meier, 87 Pac. 960

Story on Conflict of Laws, Sec. 544

---

3 *Pomeroy on Equity*, 4th Ed., Sec. 1318

---

1 *Fosters Fed. Practice*, 6th Ed. page 984

POINT V. The Judgment against the Ferdig Oil Company binds it, and those in privity with it, including Respondent.

Respondent, as purchaser at the decretal sale of Oil Well Supply Company vs. Ferdig Oil Company, must be considered in privity with the Company.

Thelen vs. District Court, 93 Mont. 49, 17 Pac. 2nd 57.

Respondent acquired his alleged interest with the knowledge of the claim of petitioner, and hence subject to his one-third interest therein.

Griffith vs. Thrasher, 94 Mont. 238, 26 Pac. 2nd, 983

Thelen vs. District Court, 93 Mont. 49, 17 Pac. 2nd, 57

Martin vs. Lawrence, 157 Calif., 191, 103 Pac. 913.

---

40 *C. J.* 508 Sec. 757.

Under the laws of Montana the lien of a judgment does not attach to the legal title to the exclusion of a prior equitable title. The purchaser takes what the debtor had.

Story vs. Black, 5 Mont. 26

---

23 *C. J.* 747, Sec. 789

The laws of Montana provide that a final judgment in a Court having general jurisdiction to pronounce the same—

> "is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceedings litigating for the same thing, under the same title, and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action."
> *R. C. Mont.* 10558

The Wyoming judgment is conclusive, not only as to the matters actually determined thereby, but also as to any other matters which might have been litigated and determined upon the issues made in the case and upon which the case was actually tried.

Phillips vs. Griffin, 236 N. Y. App. 209

U. S. vs. Calif. & Oregon Land Co., 192 U. S. 358.

Freeman on Judgments, 5th Ed. 753, 756.

Especially is this principle to be applied when the very nature of the litigation required the Ferdig Oil Company and Thelen to assert their claims they made to the property.

The effect of the Court's refusal to recognize the Wyoming judgment construing the contract and determining the rights thereunder was to permit respondent to re-litigate the issues determined in the Wyoming suit.

Cromwell vs. County of Sac, 94 U. S. 351

Dowell vs. Applegate, 152 U. S. 327 (342-344)

Nor. Pac. Ry. vs. Slaght, 205 U. S. 122.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should issue.

THEO. HOLLISTER
AUSTIN LATHERS
JAY H. HOAG
LOUIS P. DONOVAN
Counsel for Petitioner.

JOHN D. JENSWOLD
Of Counsel.

TABLE OF CASES

TABLE OF TEXT AUTHORITIES

TABLE OF STATUTES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

PETITIONER'S REPLY BRIEF

I.

The notice of the filing of the petition and copy thereof, together with the record, was served upon respondent Thelen by delivering a copy thereof to his counsel, George E. Hurd, on July 18th, 1940, as shown by the return thereof on file herein.

Rule 38

Respondent contends that Buscher, who claims an interest in the land, ought to have been made a party to this proceeding, and that notice of the filing of the petition should have been served upon him.

Attention is called to the fact that Mr. Buscher appeared in the case by filing an answer to the complaint in intervention of one McKnight. This complaint in intervention was subsequently dismissed and the complaint withdrawn. Mr. Buscher did not become a party to the action either upon order of the Court or upon his own application in the manner prescribed by the statutes of Montana, nor was he, under the Statute, a necessary party.

Revised Code of Montana, Sections 9078, 9081, 9083, 9085, *and* 9090.

Furthermore, it should be borne in mind that such interest as Mr. Buscher may have was obtained through this respondent, and that he claims a one-half interest in the land. This interest would not be affected by the decree sought by this petitioner. Petitioner claims a one-third interest. Therefore it would leave the interest of Mr. Buscher undisturbed and he is not therefore a necessary party to the proceeding and cannot be adversely affected by a judgment in favor of petitioner.

R. C. M. Sec. 9085.

No judgment is prayed for against Buscher, and no judgment could be entered against him.

The cases cited by counsel cover appeals by defendants. Much stress is put upon the rule laid down in the case of Hartford Accident & Indemnity Company vs. Bunn, 285 U. S. 169, 76 L. Ed., 685, and cases there cited, all of which affect the right of appeal by defendants against whom judgment was entered. Further, these decisions were rendered prior to the adoption of Rule 48, which appears to have become effective February 27th, 1939. This rule appears to permit an appeal in the manner taken here.

If there is any reason why Mr. Buscher is not a party to this appeal or should be made a party, petitioner consents to an order bringing him in.

II.

With respect to the decree of the United States District Court for Wyoming not being effective to award petitioner title to the lands involved herein in Toole County, Montana, counsel cites several cases which would seem to support this contention. However, a careful reading of these cases, particularly Carpenter vs. Strange, 141 U. S. 87 shows that the judgments in the foreign courts were not received as res adjudicata under the general rule that an action to determine title to lands is a local action. The decisions excluding such judgments were not based upon the exception to this general rule, that is, where

fraud, contract or trust is involved and the title to lands is an incident to a determination of the other issues the Court will take jurisdiction. This exception to the rule is frequently quoted in the cases cited.

While the contract sued upon in Wyoming was not a contract entered into with respondent Thelen, yet it was made between Wilson and Ferdig, the latter of whom conveyed the lands to the Ferdig Oil Company through whom respondent claims title. He is therefore in privity with Ferdig, one of the parties to the contract sued upon in the Wyoming Court.

Respondent's title, as heretofore stated, is based upon an alleged purchase of a tax assignment certificate and the purchase at a decretal sale. The record shows that at the time of acquiring the tax assignment certificates Thelen was acting as attorney for the Ferdig Oil Company and was the Vice-President of the Yellowstone Petroleum Corporation, the owner of eighty-five per cent of the Company's stock; (Tr. 298-299) that Thelen undertook to acquire the tax assignment for the protection of the Company and the stockholders. This was done at the instance of the president, Mr. F. J. Buscher. (Tr. 288).

Mr. Thelen testified as follows:

> "Another reason was that I wanted to protect the Ferdig Oil Company, that I might be able to get my money from it. Another reason was that they were trying to reorganize and raise money with which to put the Ferdig Oil Company on its feet, and of course I knew if they could do that I had a chance of getting my money out of it. I protected Ferdig and Ferdig Oil Company for years with the hope that we might be able to put this thing over and everybody would get their money, and I was assured by Mr. Buscher, he was in conference with the stockholders that something might be done so that everyone would be protected." (Tr. 311 and 312).

> "I remember I came up here with Mr. Buscher, we went into the matter to see if there could not be some arrange-

ment made whereby these taxes could be strung along, so that they could be paid. I remember about that time that the Oil Well Suit, or the suit had been filed, and if it had not been for that, as my memory now goes, we might have been able to put that over with the Commissioners, but there was this suit, this stuff was growing, and they said that they wanted their money (taxes due).

Q. That is, you were appearing on behalf of the Ferdig Oil Company and for them at that time?

A. Yes, I wanted to give them a chance to get these bills paid off." (Tr. 363-364).

At a meeting of the stockholders on June 9, 1931, at Cody, Mr. Buscher told the stockholders that under the arrangement with Mr. Thelen they could reimburse him and get their money back.

"If he got his money out that was all he wanted."

"He made it (this statement) to a bunch of us down there after the meeting in Cody. This was on April 2nd, 1931." (Tr. 480-481).

It appears from the record, (Tr. 466-480), that there was received by Mr. Thelen between May and December, 1931, the sum of $13,873.00 or some four thousand dollars more than was paid for his tax assignments.

It further appears on Exhibits 49, 50 and 51 (Tr. 373-378) 56 and 56-a (Tr. 428) 67 and 67-a (Tr. 558), that respondent paid the sum of $9,100 for the tax assignment affecting personal property and $1030.57 for the assignments affecting a portion of leasehold interests here involved: that the southwest quarter of the southwest quarter of Section 29, Township 35, Range 1 West, part of the land in question, was not involved in the tax assignment certificate. Furthermore, no title can be based on the tax assignment certificates.

State vs. Austin, 91 *Mont.* 76, 5 *Pac.* (2*nd*) 562.

Anderson vs. Mace, 99 *Mont.* 421, 45 *Pac.* (2*nd*) 771.

This leaves the claim of respondent Thelen based upon the decretal sale alone, and under the law of Montana, such a sale vests in the purchaser only such interest as was owned by the judgment debtor.

R. C. M. 1935, *Sec.* 9441.

Hamilton vs. Hamilton, 51 *Mont.* 509, 154 *Pac.* 717,

Chumasero vs. Vial, 3 *Mont.* 376,

Staffacher vs. Great Falls P. S. Co., 99 *Mont.* 324, 43 *Pac.* (2*nd*) 647,

R. C. M. 1935, *Sec.* 8375,

Cheadle vs. Bardwell, 92 *Mont.* 222, 26 *Pac.* (2*nd*) 336.

This purchase or acquisition of the title by Mr. Thelen was with the knowledge of the claims of petitioner. The trial court found that Mr. Thelen had notice of the pendency of plaintiff's action in Wyoming, but had no notice that plaintiff asserted any claim or title to the lands involved (Tr. 114). The Supreme Court of the State of Montana, however, reversed this finding, saying—

> "It is contended that when Thelen purchased the property of the Ferdig Oil Company at decretal sale, he knew of plaintiff's claim to a one-third interest therein by virtue of the fact that he was a party to the Wyoming suit and entered an appearance therein. That Thelen knew of this claim by plaintiff must be conceded, and the trial court's finding to the contrary was incorrect." (Tr. 678).

III.

Counsel contends that there is no Federal question involved herein and that title is based upon delinquent tax certificates and the Oil Well Supply Company's decretal sale, and cites several cases on page 16 to the effect that courts do not have jurisdiction to render a decree establishing title to land in another state.

Counsel again fails to distinguish between cases establishing the fact of a contract, fraud or trust which gives rise to the title to lands in another state and decrees which create the right or title. Illustrative of this point is Fall vs. Estin, 215 U. S. 1, where a decree in Washington in a divorce proceeding vested in the wife title to lands in Nebraska. The court in Nebraska held that the Washington court was without jurisdiction over the lands in Nebraska.

The effect claimed for the proceedings in Wyoming is the establishment of the contract between petitioner and Ferdig and the Ferdig Oil Company through whom respondent claims title.

It may be stated incidentally in passing that petitioner's contention that there was a contract as established in Wyoming, was confirmed by the testimony of Lowe and a letter which was introduced in evidence, Exhibit 71, on page 580.

IV.

The question of laches is not a material issue if it be held that the decree in Wyoming determined the contract and the rights of the petitioner to the property in Montana as against those before the Court there. There was no showing that respondent suffered any damage by any delay which may have occurred after the entry of the decree in the Wyoming suit. There is therefore no basis for any such finding as the trial court made on the subject of laches.

10 *Ruling Case Law, Equity, Section* 143

McIntyre vs. Pryor, 173 *U. S.*, 38 (54)

Boatch vs. Boysen, 175 *Fed. 2nd*, 702 (707)

The money was paid by respondent Thelen with the knowledge of the claims of petitioner and prior to the trial of the suit in Wyoming, and at a time when that suit was pending. Furthermore respondent Thelen failed to disclose his interest in the trial at Wyoming though a witness there, and the complaint called for a disclosure of such property as the defendants, including Thelen, had in their possession to which petitioner

made claim, and the complaint described a portion of the lands here involved.

Not only had the expenditure been made by Mr. Thelen prior to the trial of the Wyoming suit, but during the year of 1931 and prior to the entry of the decree herein respondent had been repaid substantially all the money invested by him in the tax assignment certificates and the purchase at the decretal sale as shown by the figures set forth earlier in this brief.

Following the entry of the decree on December 11, 1931, an appeal was immediately taken to the Circuit Court of Appeals. This appeal was argued in January, 1933, and decided in the spring of that year, and shortly thereafter this action was commenced in June of that same year, 1933.

It should therefore follow that if the Wyoming Court had jurisdiction to render the decree that was rendered, petitioner asserted his claim to the land and cannot be charged with laches. This presents a Federal question for this Court to consider.

The Supreme Court of the State of Montana stated in its opinion—

> "As before stated, the main question here is whether the decree in the Wyoming Court was res adjudicata. The pleadings need not be analyzed in detail. It is sufficient to say that the pleadings therein on the part of plaintiff raised the question of the title and ownership of the land here involved. The answer of defendant Thelen in that action did not set forth the facts constituting his chain of title. It is contended by plaintiff that Thelen should have set forth his interest in and to the property in the Wyoming suit, and, not having done so, he is precluded from now asserting any interest therein.
>
> "There would be merit in plaintiff's contention if the Wyoming court had jurisdiction to litigate title to land in Montana. But it is firmly established that an action to determine title to or an interest in real estate is local and that courts of one state have no jurisdiction to litigate the title to lands in another state." (Tr. 677).

"Had Thelen set out his interest in the property in the answer in the Wyoming case, the court would not have acquired jurisdiction to adjudicate title to the Montana property. The Circuit Court of Appeals in Ferdig Oil Company vs. Wilson, 91 Fed. (2d) 857, held that since defendant Thelen filed an answer in the Federal Court in Wyoming, he submitted himself and his property rights to the jurisdiction of the court no matter where the property was situated. The authorities cited by the court in support of its conclusions are not in point and do not sustain the court's conclusion. We have not found any other authorities sustaining that view." (Tr. 678).

It is apparent that the Supreme Court of Montana would have reversed the trial court had it not adopted the wrong premise as expressed by the general rule affecting the jurisdiction of foreign courts over the subject of title to lands. The Court overruled the decision of the Circuit Court of Appeals in Ferdig Oil Company vs. Wilson, 91 Fed. (2nd) 857, and refused to recognize the validity of the Wyoming Court in the face of the plain language of the constitution of the United States. The Court failed to consider the exception to the general rule relating to the litigation of title to lands where is involved a contract, fraud or trust. This exception is specifically set forth in practically all of the cases cited by counsel, including Carpenter vs. Strange, 141 U. S. 87. This subject has been covered more extensively in the main brief of petitioner.

Counsel has evidently read only a part of Carpenter vs. Strange. He does not appear to appreciate the exception to the general rule therein clearly set forth. The question of laches therefore becomes a Federal question if the Wyoming decree ought to have been recognized as determining the contract, fraud and trust. If the record discloses no basis of fact for the decision of the State Court denying the Federal rights, it is the duty of this Court to review and correct the error.

Postal Telegraph Cable Co. vs. Newport, 247 *U. S.* 464 (473)

Ward vs. Love Co. 253 *U. S.* 17 (22)

The question of laches involves therefore the examination of the record which can more properly be considered after the issuance of the writ of certiorari.

Where laches operate to bar a claim a Court should consider whether an important witness has died, whether the property has increased in value, or has passed into the hands of an innocent party, or whether the condition of the parties has changed to the detriment of one.

> "The conclusion whether on the facts it would be inequitable to enforce the right and where the claimant is barred by laches involves a question of law."
>
> 10 *R. C. L., Sec.* 10146, *pg.* 400.

Upon the trial it developed that Ferdig who could have testified concerning the contract with Wilson died in August of 1931. His testimony would have been relevant under the Court's decision that the Wyoming Court was without jurisdiction. Ferdig, though living at the time of the trial of the Wyoming case and though served with the process and directly interested in the issues then being tried, nevertheless was not called as a witness and did not testify. There is no presumption that he would have denied the claim of petitioner had he been present at the trial of this cause. On the contrary, had it been held that the Wyoming decree was res adjudicata as to the fact of the contract, such testimony would not have been relevant and lapse of time would not have prejudiced this respondent.

As to other grounds tending to prove laches, the evidence shows re-payment before December, 1931 of most of the money invested by respondent and that there was no investment made after December 1931 by respondent. The record further fails to show any injustice or laches resulting in detriment to respondent between December, 1931 and June, 1933, or in fact at any other time. There is not a scintilla of evidence anywhere in the case that respondent suffered any damage by reason of any delay in bringing the Montana case.

Lack of knowledge is an excuse for delay in prosecuting a claim. It does not appear from the record that petitioner knew

of the alleged acquisition of the property by respondent prior to the commencement of the present action. It does appear, however, that respondent failed to disclose this fact in the trial of the Wyoming suit. (Tr. 353 to 355).

Mr. Thelen testifying in the Wyoming case as shown by the deposition of the Court reporter who took the testimony in the Wyoming case, stated that the Yellowstone Petroleum Company was formed after Mr. Ferdig went to Wyoming, and that it was Mr. Ferdig's desire that the stockholders of the Ferdig Oil Company should become stockholders of the Yellowstone Petroleum Company in order to recoup losses sustained in the Ferdig Oil Company. He testified:

> "A. Yes, and when started operating in Cody he (Ferdig) became disgusted with the oil fields in Montana—the wells were small and they were rapidly going down, he had one well that produced 1,000 barrels, and, over night, it turned to water.
>
> Q. That was known as No. 12?
>
> A. Yes, I think that flowed three or four months with oil, and it turned to water over night, and he drilled about 19 or 20 wells around there to find that same streak of oil, and he could not find it, they were all dry holes—and he became disgusted, and he came down into Wyoming, and got out into the Oregon Basin, and that looked like—he reported that the Ohio Oil Company had brought in an oil well of 20,000 barrels, and they had capped it, and I think some of the papers made quite a flurry about the big oil field out there, and he got interested with another man out there who had an old rig, and he wanted to get into this big production.
>
> Q. That is the Yellowstone Petroleum Company?
>
> A. The Yellowstone Petroleum Company. He then said to me 'These people in the Ferdig Oil Company are all good friends of mine. I would like to have them have an opportunity of turning their stock into the Yellowstone stock.'

Q. That is, exchange share for share?

A. 'And receiving therefor a share of Yellowstone stock for a share of the Ferdig Oil Company, and, in that way, they would be getting in on this fine thing down there, and I can make some money for them'; and that was the idea." (Tr. 145-146).

Had Thelen testified in the Wyoming Court at this time that he had within two weeks purchased the property of the Ferdig Oil Company at a decretal sale and had previously taken an assignment of tax certificates, and had Thelen disclosed that the wells in Montana were producing approximately four thousand barrels of oil per month and that a Refining Company owed the Ferdig Oil Company approximately twenty thousand dollars (which was subsequently paid to Thelen) the petitioner would have had knowledge of these facts, and it is not conceivable that he would have allowed any time to lapse in seeking to recover possession of these assets. The issues would have been litigated in Wyoming. Therefore it is inequitable for Thelen to now charge the petitioner with laches in a delay in bringing the action when he (Thelen) failed to make the disclosure of these facts in the Wyoming suit. His testimony was misleading and untrue. To give respondent the benefit of the defense of laches would be inequitable and laches is an equitable defense. Furthermore, the only pleading in the present suit with respect to laches is an allegation that this petitioner delayed for nine years in asserting any claim to the lands in question. (Tr. 85).

Laches being an affirmative defense must be pleaded and proved.

THEO. HOLLISTER
AUSTIN LATHERS
JAY H. HOAG
Providence Building,
Duluth, Minnesota.

LOUIS P. DONOVAN,
Shelby, Montana.
Counsel for Petitioner.

JOHN D. JENSWOLD,
Providence Building,
Duluth, Minnesota.
Of Counsel.

THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

RESPONDENT THELEN'S
OPPOSING PETITION FOR
CERTIORARI

JOHN N. THELEN
GEO. E. HURD,
Strain Building,
Great Falls, Montana
Attorneys for Respondent

INDEX

SUBJECT INDEX

TABLE OF CASES

TABLE OF TEXT AUTHORITIES

TABLE OF STATUTES

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

RESPONDENT THELEN'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

I

DEFECT IN PARTIES RESPONDENT WHICH PRECLUDES GRANTING OF WRIT OF CERTIORARI

The trial court in its findings of fact and decree adjudicated that the respondent Thelen and one of the defendants, F. J. Buscher, were the owners of the oil leasehold interests involved herein (I Tr. pp. 107A-118).

This decree and the findings of fact and conclusions of law were affirmed by the Supreme Court of the State of Montana on March 18th, 1940 (III Tr. pp. 675-680).

The decree was in favor of respondent Thelen and defendant Buscher and was joint, as appears upon the face of the record (III Tr. pp. 675-680).

On June 18th, 1940, petition for writ of certiorari to the Supreme Court of Montana was filed in this court. It seeks to have the decision of the Supreme Court of Montana reviewed only so far as respondent Thelen was concerned.

As appears from the record no notice of the filing of the petition was served upon respondent Thelen. Defendant Buscher, although a party to the decree, which was joint and indivisible, was not made a party to these proceedings.

Section 350, Title 28, U. S. C. A. page 376, applies alike to writ of error, appeal, or writ of certiorari. Hence, defendant Buscher cannot now or ever be made a party hereto.

Under Rule 38, subdivision 3, no notice of the filing of the petition was given to respondent Thelen within the time allowed by the rules of this court. It was not known until August 5th, 1940, that the petition had been filed. (See Clerk's letter dated August 5th, 1940 in file in the above entitled case).

The petition, brief in support thereof and record have never been served upon defendant Buscher. Counsel for respondent Thelen have no authority to appear for and

do not appear for defendant Buscher.

Unless all the parties to a judgment or decree, joint as to any of them, are before this Court proceedings to review the judgment or decree of the Court below will be dismissed. The test as to whether the judgment or decree is joint is: Does the face of the record reveal a joint judgment or decree?

This Court will go no further than to determine that fact.

Hartford Acc. & Ind. Co., v. Bunn,
285 U. S. 169, 76 L. Ed. 685;

Haseltine v. Central National Bank,
183 U. S. 130, 46 L. Ed. 117.

We adopt the reasoning of this Court in Hartford Acc. & Ind. Co., v. Bunn, 285 U. S. 169, 76 L. Ed. 685, applicable, by conversing the rule, to the question herein involved and which is as follows:

> "The judgment is joint in form and no reason appears why either or both of the parties defendant therein might not have appealed to this Court and submitted claims of error for our determination. In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty.
>
> Haseltine v. Central National Bank, 183 U. S. 130, 131, 46 L. Ed. 117, 118, 22 S. Ct. 49—'We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie . . . While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may

happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under Mower v. Fletcher (114 U. S. 127, 29 L. Ed. 117, 5 S. Ct. 799) they might have sued out a writ of error at once.'

Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 268, 269, 56 L. Ed. 1082, 1085, 1086, 32 S. Ct. 828. The question was: To which state court should the writ of error run? This Court said—'The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several States on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court susceptible of being reviewed

here, and the confusion which arose utimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from departing from the face of the record and deducing the principle of finality by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule as applied to a question like the one before us is, we think, apparent by the statement which we have made concerning the rule in the Crovo Case (220 U. S. 364, 55 L. Ed. 498, 31 S. Ct. 399) and the previous decisions.'

See Estis v. Trabue, 128 U. S. 225, 229, 32 L. Ed. 437, 438, 9 S. Ct. 58; Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. Ed. 1000, 1002, 25 S. Ct. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 101, 57 L. Ed. 138, 140, 33 S. Ct. 78; Second Nat. Bank v. First Nat. Bank, 242 U. S. 600, 602, 61 L. Ed. 518, 519, 37 S. Ct. 236; Bruce v. Tobin, 245 U. S. 18, 19, 62 L. Ed. 123, 124, 38 S. Ct. 7; Matthews v. Huwe, 269 U. S. 262, 264, 70 L. Ed. 266, 267, 46 S. Ct. 108.

Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 417, 19 L. Ed. 953, 954, held—'It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. . . One of the effects of this judgment of severance was to bar the party who re-

fused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature.'

In Estis v. Trabue, 128 U. S. 225, 32 L. Ed. 437, 9 S. Ct. 58, an attachment was levied upon certain personality. After the return Estis, Doan & Co. claimed the property and they gave a forthcoming bond with two securities. The challenged judgment ruled 'that the plaintiffs recover of the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond, the sum of six thousand and three hundred dollars, together with the cost, (etc.).' This Court held—"The judgment is distinctly one against "the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. Ex parte Sawyer, 21 Wall. 235, 240, 22 L. Ed. 617, 619. It is well settled that all the parties against whom a judgment of this kind if entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered.'

Mason v. United States, 136 U. S. 581, 34 L. Ed. 545, 10 S. Ct. 1062. A postmaster and the sureties on his official bond were sued jointly. He and some of the sureties appeared and defended. The suit was abated

as to two of the sureties, who had died. The others defaulted, and the judgment of default went against them. On the trial there was a verdict for the plaintiff, whereupon July 14, 1886, judgment was entered against the principal and all the sureties. The sureties who had appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default and the record came here. May 5, 1890, and after expiration of the two years within which the statute then permitted the suing out of such writs, the plaintiff in error moved to amend the writ by adding the omitted parties as complainants, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed.

Hardee v. Wilson, 146 U. S. 179, 180, 36 L. Ed. 933, 13 S. Ct. 39, cited earlier cases and declared—'Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal.' See also Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563, 14 S. Ct. 693; Maytin v. Vela, 216 U. S. 598, 601, 54 L. Ed. 632, 634, 30 S. Ct. 439; Hughes, Fed. Pr. sec. 6153.

The New York, 44 C. C. A. 38, 104 Fed. 561 (Court of Appeals, Sixth Circuit, October 13, 1900) is said to support the view that in the circumstances here presented summons and severance was unnecessary. The proceeding was a cause in admiralty. The surety upon a stipulation for release of the vessel did not join in the appeal. Upon motion to dismiss, the court said—'It is well settled that all parties against whom a joint judgment or decree is rendered must join in proceeding for review in an appellate court, or that it must appear that those who have not joined had notice of the application for the appeal or writ of error, and refused or neglected to join therein.' But it ruled that, though joint in form, the decree was separable in law and fact and, therefore, the surety was not a necessary party to the appeal."

Should it be urged that the decision above quoted from has reference to joint plaintiffs or petitioners, it is answered that the basic principle upon which the decision and its supporting authorities are predicated is that this Court will not review decisions of lower courts, Federal or State, unless all the necessary parties are before it.

Petitioner began this suit against respondent Thelen only (I Tr. p. 2). When the answer came in the defendant Buscher became a necessary and indispensable party thereto and the title of the case was changed (I Tr. pp. 58A-88). Thenceforth, defendant Buscher was a necessary and indispensable party, and in the decree he was adjudicated a joint owner with respondent Thelen of the properties involved herein (I Tr. pp. 107A-118). Thenceforth, defendant Buscher was a necessary and indispensable party to all subsequent proceedings. Neither his nor respondent Thelen's specific interests were determined in the decree. They are joint owners of the property rights en gross.

Since this Court cannot separate their respective interests and defendant Buscher is not a party to these proceedings this Court, under its decisions, will not review the decision of the Supreme Court of Montana affirming the trial court. In joint judgment or decree cases all parties interested must be brought into this Court before its juridiction, absolute or discretionary, may be exercised.

Hartford Acc. & Ind. Co.,
285 U. S. 169, 76 L. Ed. 685.

Since defendant Buscher has not been brought into this Court, neither respondent Thelen's rights nor defendant Buscher's rights, which are joint, may be determined herein.

II

The Decree of United States District Court For Wyoming Was Not Effective to Award Petitioner Title to or Interest in the Lands Involved Herein Situated in Toole County.

In the amended bill of complaint (III Tr. pp. 692-731) filed on January 20, 1930, in the United States District Court for the District of Wyoming (III Tr. p. 692) the petitioner in that court sought to terminate a joint adventure between him, one H. L. Lowe, who was not served with process and never appeared in the suit, and S. C. Ferdig and to have an accounting from Ferdig and others including the respondent herein. The bill of complaint sought to trace moneys claimed to have been paid by Wilson to Ferdig which were used in said joint adventure and to have Wilson declared to be the owner of one-third of sixteen thousand units of the Sylvester Oil Company, a common law trust, and to have the assets of that trust distributed pro rata in accordance with the units and that on the liquidation of the assets petitioner Wilson sought to be adjudged the owner of a one-third interest.

In the decree in the Wyoming Court, respondent Thelen

was dismissed out of the suit on the merits, and with his costs against the petitioner (I Tr. pp. 127-128). That decree was rendered on December 11, 1931 (I Tr. p. 128).

Before August 6, 1929, when the Wyoming suit was commenced, the lands involved herein had been sold by Toole County, Montana, on January 29, 1929, for delinquent taxes and struck off to the county (I Tr. p. 113). Later respondent, on May 6, 1931, to protect his own interests, purchased the certificate of tax sale from Toole County (I Tr. p. 113). Also, the Oil Well Supply Company on December 20, 1928, (I Tr. pp. 188-193), about nine months before the Wyoming suit was commenced, filed its lien against the lands in Toole County which lien was subsequently foreclosed on June 2, 1931 (I Tr. pp. 206- 213) and a sale of the lands was made July 10, 1931, (I Tr. pp. 214-216) by the sheriff of Toole County under the decree on July 10, 1931 at which sale respondent became the purchaser (I Tr. p. 215).

At the time the Wyoming decree was rendered the tax sale and the decretal sale had extinguished all alleged or claimed interests of petitioner in the lands involved herein in Montana.

The Supreme Court of Montana in its opinion (III Tr. pp. 675-680), affirming the trial court's findings of fact and decree, expressly held, as did the trial court, that Thelen acted in good faith and had the legal right to obtain the tax certificate from Toole County and to purchase at decretal sale. Sheriff's deed to the lands,

pursuant to the decretal sale, went to respondent Thelen on September 20, 1932 (I Tr. pp. 216-220).

Petitioner did not commence this action until June 15, 1933 (I Tr. p. 2), and never made any claim upon respondent for any interest in the land prior to the time the original complaint in this suit was filed (II Tr. pp. 338-339).

Under the law of Montana, oil leaseholds and other interests in oil lands such as royalties are real property.

Homestake Exploration Corp. v. Schoregge,
81 Mont. 604, 264 Pac. 388.

Suits and actions to recover such real property or an estate or an interest therein or for the determination, in any form, of such right or interest must be commenced in the county wherein such real property is situated.

Section 9093, Revised Codes of Montana, 1935;

McKinney v. Mires,
95 Mont. 191, 26 Pac. (2d) 169.

A purchaser at execution or decretal sale becomes the owner of the property as of the date of sale, subject only to the right of redemption within one year after the date of the sale.

Section 9441, Revised Codes of Montana, 1935;

McQueeney v. Toomey,
36 Mont. 282, 92 Pac. 561.

Respondent Thelen became the owner of the land under the decree in Oil Well Supply Company vs. Ferdig Oil Company on July 10, 1931 (I Tr. pp. 206-213).

It seems obvious, therefore, that the Wyoming decree could not possibly have the effect contended for by petitioner of establishing any interests in the petitioner in and to the lands involved herein. The Wyoming Court had no jurisdiction of the lands, and any and all interest claimed or asserted by petitioner had been extinguished more than five months before the Wyoming decree was rendered. Moreover, respondent was dismissed out of the Wyoming Court on the merits.

The Supreme Court of Montana affirming the trial court of Toole County held that the Wyoming suit was a local action and any decree it rendered in such action could not determine that petitioner had any interest in the lands in Montana involved herein.

That rule is well established.

15 C. J. 472;

14 Am. Jur. p. 430-432;

7 R. C. L. 1059;

Ellenwood v. Marietta Chair Co.,
158 U. S. 105, 39 L. Ed. 913;

Carpenter v. Strange,
141 U. S. 87, 35 L. Ed. 640;

Brach v. Moen,
(8th C. C. A.) 4 Fed. (2d) 786;

Shell Petroleum Co. v. Moore,
(5th C. C. A.) 46 Fed. (2d) 959.

Petitioner does not contend that respondent Thelen was a party to any contract of joint adventure or otherwise between petitioner Wilson, H. L. Lowe and S. C. Ferdig.

Largely, the cases cited in petitioner's brief have to do with enforcing the cancellation of contracts but none of them go to the point involved in this case of holding that without any contractual relationship the Court in a foreign jurisdiction may determine interest in lands which can not be subjected to the jurisdiction of the foreign court.

Hence, it is obvious that the decisions cited in petitioner's brief along that line are not in point in this case.

III

No Federal Question is Involved Herein

The sole basis of the claim of petitioner in the trial court and Supreme Court of Montana and here, is that the trial and Supreme Courts of Montana did not accord full faith and credit to the Wyoming judgment.

Let it be remembered that at delinquent tax sale in Toole County, Montana, on January 29, 1929, nearly six months before the Wyoming suit was filed, Toole County had become the owner of the lands involved herein by acquiring the same through tax proceedings.

Let it further be emphasized that at the time the Wyoming suit was commenced, petitioner herein had not and never thereafter did redeem said lands from the tax sale.

Let it further be remembered that on December 20, 1928, the Oil Well Supply Company had filed its lien upon the lands involved herein, which lien was subsequently, on June 2, 1931, foreclosed, but which lien

existed and was valid for nearly eight months prior to the commencement of the Wyoming suit.

It is absurd to suppose that the Wyoming Court undertook, by the decree which is in the record herein, to deprive Toole County, Montana, of its title acquired under tax proceedings or to deprive the Oil Well Supply Company of its valid lien against the property herein involved when neither the tax proceedings nor the lien nor respondent's title acquired through the foreclosure of lien proceedings and through tax proceedings instituted by Toole County were before the Wyoming Court.

The Supreme Court of Montana agreed with us when we pointed out that the Wyoming Court could not possibly have entered any decree which would establish petitioner's alleged one-third interest in the lands, which are the subject matter of this suit, because Toole County and the Oil Well Supply Company, whose interests were prior to those of petitioner Wilson, were not before the Wyoming Court and at the time the Wyoming Court rendered its decree, all possible interests of the petitioner Wilson in and to the lands in Toole County, Montana, had been extinguished and the petitioner Thelen was the owner of such lands freed of any claim of petitioner at the time the Wyoming decree was entered.

Moreover, the declaration of trust of the Sylvester Oil Company, out of which petitioner Wilson contends his rights arose, expressly provides that no unit holder of the Sylvester Oil Company who bound himself by all of the terms and provisions of the declaration of trust

(I Tr. pp. 43-52), shall have any legal title to the trust property, real or personal, held from time to time by the trustee and should have no equitable estate in the lands and appurtenances belonging to the trust property, but that his or her interest should be only an interest in the money to arise from the sale or other disposition of the property made by the trustee (I Tr. p 50).

The amended bill of complaint did not seek to have a one-third interest in the lands involved herein decreed to petitioner Wilson, nor does the decree attempt to determine the extent and descriptions of the lands involved herein. In fact, the decree of the Wyoming Court is merely interlocutory, authorizing an accounting as against all of the defendants, except the respondent Thelen, who was dismissed out of the suit and Lowe and Cody Petroleum Company. That decree never has had any effect anywhere other than as an interlocutory decree. Petitioner Wilson herein did not follow up the advantage he had by such decree by taking the steps the decree authorized and subsequently obtaining a final decree.

Upon these facts, we can find no principles upon which petitioner Wilson may now contend that any interest in the lands involved in this case was established by such decree, because the decree itself does not attempt to establish any interest in the lands in Toole County but does provide a method for the termination of the alleged joint adventure.

However, in plaintiff's complaint in this case, in the

trial court (I Tr. pp. 2-50), petitioner tendered the issue of joint adventure to be litigated in the District Court for Toole County. Issues were joined on the formation of such joint adventure and were found in favor of the respondent Thelen and defendant Buscher by the trial court.

When that amended complaint was drawn by the same counsel who appear in this proceeding, they would not have tendered an issue of joint adventure between petitioner, Ferdig and Lowe unless they thought that such issue could be litigated in the court in which the issue was tendered by the petitioner.

In these circumstances, the clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, is subordinate to the rule that the courts of one state are without jurisdiction over title to lands in another state. Obviously, the full faith and credit rule can not apply to records and proceedings of courts of another state which do not have jurisdiction to render a decree establishing title to land in another state.

14 Am. Jur. Sec. 238, pp. 430-432;

Lindsley v. O'Reilly,
50 N. J. Law 366, 15 Atl. 379;

Ophir Silver Min. Co., v. Superior Court,
147 Cal. 467, 82 Pac. 70;

Sharp v. Sharp,
65 Okla. 76, 166 Pac. 175;

Fall v. Estin,
215 U. S. 1, 54 L. Ed. 65.

In the last cited case, the rule is succintly stated by this Court as follows:

> "But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. Eq. Jur. Sections 1317, 1318, and notes."

The cases relied upon in petitioner's brief for writ of certiorari herein do not differ in any manner from the excerpt above set forth. However, this is not a case wherein respondent Thelen in the District Court of Wyoming was ordered, commanded, or directed by that Court to do anything.

The fatal defect in petitioner's contention in the trial court, the Supreme Court of Montana, and here, is the fact that the Wyoming Court did not adjudicate as be-

tween Thelen and petitioner, any rights whatsoever. When that Court dismissed Thelen out of the case pending before it on the merits, it had no further jurisdiction over him.

Repeatedly, we have pointed out in this lengthy litigation and with success in the trial court and in the Supreme Court of the State of Montana, that petitioner had simply overlooked or ignored the fundamental principles upon which a decree of a foreign jurisdiction might be given effect under the Federal Constitution. Petitioner's counsel have refused to recognize the fact that the Wyoming Court did not direct or command respondent Thelen to do anything. Notwithstanding that plain principle, petitioner loads down his brief with cases wherein foreign courts have commanded a party to a suit who was before the court to do certain things concerning real estate in other jurisdictions. But as was said by this Court in Fall v. Estin, even though a party was ordered to do, or refrained from doing such acts, still no legal title was transferred from one party to another by such order or decree.

Thus, it is apparent that even though all parties necessary and indispensable to the determination of this case were before this Court, it would be without authority to issue a writ of certiorari to the Supreme Court of the State of Montana because there is no federal question involved herein.

IV

Petitioner Was Guilty Of Laches, And If No Other Grounds For Denial Of Relief To Him Existed He Could Not Prevail In The Montana Courts

The trial court found, concluded and decreed, upon this record, that petitioner Wilson had been and was guilty of laches in failing timely to assert his alleged claims now asserted (I Tr. pp. 109-118).

This decision was affirmed by the Supreme Court of Montana (III Tr. pp. 675-680).

The Wyoming decree was rendered December 11, 1931 (I Tr. p. 128). Until this suit was commenced June 15, 1933 (I Tr. p. 2), petitioner Wilson made no claims to the lands or any part thereof involved herein (II Tr. pp. 338-339).

The trial court found, and the Supreme Court of Montana, affirmed the finding (I Tr. p. 114, Finding XIX):

> "That between December 11, 1931, and the date of the institution of this action, Sam A. Wilson made no claim or demand whatsoever to these lands involved herein, and made no attempt to redeem said lands, but that said Sam A. Wilson stood by speculating as to the possible increase of value of said properties."

The trial court concluded and decreed, and the Supreme Court of Montana affirmed the conclusion and decree (I Tr. p. 115, Conclusion IV, and decree I Tr. pp. 116-118), that petitioner Wilson had been guilty of laches in delaying to give notice or to assert any claim whatever against respondent Thelen and defendant Buscher.

It is elementary that in litigation affecting oil properties, promptness in asserting claims is essential and when claims are not promptly and timely asserted they are lost.

Taylor v. Salt Creek Cons. Oil Co.,
(8th C. C. A.) 285 Fed. 532;

Robbins v. Elk Basin Con. Pet. Co.,
(D. C. Wyo.) 285 Fed. 179;

Abraham v. Ordway,
158 U. S. 416, 39 L. Ed. 1036;

Galleher v. Cadwell,
145 U. S. 368, 36 L. Ed. 738;

Twin-Lick Oil Co. v. Marbury,
91 U. S. 587, 23 L. Ed. 328;

Patterson v. Hewitt,
195 U. S. 309, 49 L. Ed. 214;

O'Hanlon v. Ruby Gulch Min. Co.,
64 Mont. 318, 209 Pac. 1062.

Determination of the question of laches applicable to oil properties is purely a question of local law.

In the determination thereof in this case no federal question arises.

Even though the Wyoming decree had awarded petitioner Wilson interests in oil lands in Montana, which it did not, petitioner's laches as above pointed out barred him from prevailing in this action.

V

CONCLUSIONS

We respectfully urge that we have established the following conclusions:

1. That the decree of the District Court of Toole County in favor of respondent Thelen and defendant Buscher is on its face a joint decree and since Buscher was not made a party hereto by petitioner within three months from March 18, 1940, and can not now be made a party hereto, this Court does not have all of the necessary and indispensable parties before it and will not undertake to adjudicate any asserted rights of the petitioner;
2. That the United States District Court for the District of Wyoming in Wilson vs. Ferdig, et al., was without authority or jurisdiction over the land involved herein which is situated in Toole County, Montana, and that the decree in Wilson vs. Ferdig, et al., rendered by the District Court of Wyoming did not establish any right in Wilson in and to any interest in the lands in Toole County, Montana;
3. That no occasion arose in the litigation in Montana to invoke the power of any of its courts to give full faith and credit to the Wyoming decree, which was rendered beyond jurisdiction, and, hence, no federal question is involved in this proceeding;
4. That petitioner Wilson was guilty of laches and therefore barred from asserting any claim or claims to the oil interests herein involved for the following reasons:
   (a) That more than five years elapsed after the 24th day of January, 1924, alleged

by him to be the date of the origin of the joint adventure between him, Ferdig and Lowe, before he commenced any action to have his interests determined;

(b) That after the decree rendered by the United States District Court in and for the District of Wyoming on December 11, 1931, at which time all of the rights, titles, claims, interest, equities and demands of the petitioner Wilson in and to the lands involved herein had been extinguished by tax proceedings by Toole County, Montana, and by lien foreclosure in Oil Well Supply Company vs. Ferdig Oil Company, petitioner took no steps promptly to assert his rights to the lands involved herein, gave no notice to the respondent Thelen and the defendant Buscher of his rights and thereby was guilty of laches and barred from asserting any rights whatever they may have been which he claims to have been determined by the United States District Court for the District of Wyoming;

(c) That until the 15th day of June, 1933, petitioner Wilson made no claim to, gave no notice of his claimed rights to the lands involved herein to the respondent Thelen and the defendant Buscher, and that since

the trial court found that he was standing by speculating on whether the oil lands involved herein were valuable, he has, by failure promptly to exercise his rights, become guilty of such laches as to bar him of any rights, particularly after respondent Thelen had expended more than nineteen thousand dollars without knowledge of said petitioner's claims to protect himself;

(d) That it would be inequitable and unconscionable now to allow or permit said petitioner to have any interests in and to the lands and the oil content thereof involved herein because of his laches.

We, therefore, respectfully urge that the petition for a writ of certiorari be denied.

JOHN N. THELEN,
Strain Building,
Great Falls, Montana.

GEO. E. HURD,
Strain Building,
Great Falls, Montana.
Attorneys for Respondent Thelen.